POH SWEE HOON

v.

SYARIKAT TANAHRUMAH SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL RAZAK J
[CIVIL SUIT NO. C 1868 OF 1983]
9 MAY 1984

CIVIL PROCEDURE: *Statement of claim - Application to strike out and for an interlocutory judgment on claim to be assessed - Agreement for sale and purchase of shares - Whether defendant in breach - Dispute regarding amount and interest payable.*

The application was by the defendant to strike out the plaintiff's statement of claim and for an interlocutary judgment on the claim to be assessed. The plaintiff and defendant entered into a sale and purchase agreement of shares. The plaintiff alleged that there had been a breach by the defendant in payment of the balance of the purchase price still due and claimed RM1,062,582.70, including interest. The defendant, on the other hand, claimed that only RM917,888.13, including interests, was still due. They counterclaimed for damages for their failure to sell the shares to a third party as a result of the plaintiff's failure to deliver the shares to them and for the return of all monies paid for total failure of consideration or as money had and received.

Held:

[1] There was no breach of contract on the part of the defendant. Late payments had been made but by her conduct, the plaintiff had waived the default.

[2] The amount, including interest, claimed by the defendant to be still outstanding was the correct amount.

[Order-in-terms of application made.]

For the plaintiff/respondent - Khaw Chay Tee; M/s. Allen & Gledhill
For the defendant/applicant - William Leong; M/s. Joseph Tan & Tang

JUDGMENT

Abdul Razak J:

This is an application by the defendant to strike out the plaintiff's statement of claim and for an interlocutory judgment on the claim to be assessed. The plaintiff and the defendant had agreed to sell and buy shares respectively for the sum of RM1,425,000 consisting of 10,000 shares. The method of payment was set out in cl. 2 of the agreement between them (Exhibit A). The agreement acknowledged receipt by the plaintiff of the sum of RM225,000 from the defendant in July 1976 and RM200,000 on the 7 December 1977 on the execution of the agreement. The balance of the purchase price of RM1,000,000 was to be paid by four equal instalments of RM250,000 each payable on the 1 March 1978, 1 June 1978, 1 September 1978 and 1 December 1978. For failure to make any of these payments in accordance thereto, the defendant would be liable to 1% interest per month. The plaintiff said there had been a breach by the defendant in payment of these instalments, for which a sum of RM1,062,582.70 was due, including interest. The defendant denied the claim and said the amount due was only RM917,888.13 including interest. They counterclaimed for damages at RM1.6 million for

their failure to sell the shares to a third party due to the plaintiff's failure to deliver the shares to them (the defendant) and interest. They said the plaintiff had knowledge of such intended transfer to the third party. They also claimed for the return of all monies paid to the plaintiff amounting to RM865,000 due to the total failure of consideration or, in the alternative, as money had and received.

It seems to me, there was clearly a failure to pay the instalment in time, as the defendant themselves admitted, but it was also clear that nevertheless payments were made by the defendant and received by the plaintiff towards the purchase price. Indeed, it can safely be said that the plaintiff was, by her conduct, prepared to waive the default in the payment and not to treat it as a breach. The cause of the deadlock between the parties was in the short payment which the plaintiff alleged the defendant had made in the sum of RM100,000. This came about because at some stage of the payments the defendant said the balance of the purchase price was RM560,000, whereas the plaintiff said it was RM660,000. The latter said she had not received the sum of RM100,000, being the difference between the two amounts. The defendant said she had, and produced the cheque for the amount, which was cleared by the bank. The plaintiff said this could not be true because the plaintiff's husband had testified that he had returned the cheque, which was dishonoured, to the bank purportedly on the 2 February 1979. But I do not think that was in fact so. It seems clear the cheque was dishonoured the first time. The defendant confirmed this in their letter of the 2 February 1979. However, it (Exhibit `H.1') was again presented to the Bank and was cleared on the 7 February as the cheque itself showed and confirmed by the bank account (Exhibit 'H2'). Therefore, what the plaintiff's husband said cannot really be true. The question of interest was next raised. Counsel for the plaintiff said that interest claimed was RM406,256.67, whereas the amount shown by the defendant was RM369,088.13. But there does not seem to be any real difference, if it is accepted that the defendant did not owe the plaintiff the RM100,000, since the RM406,256.67 interest is based on the principal sum of RM675,000. This includes the RM100,000 the subject of dispute, and also another RM15,000 which the plaintiff admitted was wrongly added. If we minus these two items, the capital sum would be the same as the defendant's calculation at RM560,000 which, at 12% per annum (which both parties do not dispute), would become RM369,088.13.

In the circumstances, I would make the order-in-terms of the application.

Also found at [1984] 2 CLJ 289